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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 444.

FLORENCE B. BIGELOW, MARION B. ROERBER, JOHN E. BLOOM AND WILLIAM C. BLOOM,

Petitioners,

vs.

RKO RADIO PICTURES, INC., A CORPORATION, LOEW'S, INCORPORATED, A CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, A CORPORATION, PARAMOUNT PICTURES, INC., A CORPORATION, BALABAN & KATZ CORPORATION, A CORPORATION, VITAGRAPH, INC., A CORPORATION, WARNER BROS. PICTURES, INC., A CORPORATION, WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, A CORPORATION, AND WARNER BROS. THEATRES, INC., A CORPORATION,

Respondents.

BRIEF FOR PETITIONERS.

THOMAS C. MCCONNELL,
HUBERT VAN HOOK,
Counsel for Petitioners.

Dated at Chicago, Illinois,
January 4, 1946.

THE DUNHORP WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit appears in the record at page 2263, and is reported in 150 F. 2d 877. The district court filed no opinion.

JURISDICTION.

The jurisdiction of this Court is invoked by writ of certiorari granted November 5, 1945 under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 USCA § 347(a).

A CONCISE STATEMENT OF THE CASE.

(a) Nature of the Case.

Petitioners brought this suit under Sections 1, 2 and 7 of the Sherman Act, 26 Stat. 209-210, and Section 4 of the Clayton Act, 38 Stat. 731, 15 USCA §§ 1, 2 and 15, for an injunction and to recover threefold damages. The complaint was that respondents maintained a monopoly and price-fixing conspiracy as a result of which petitioners' theatre was prevented from showing motion pictures until after they had been shown in respondents' competing theatres (R. 4-12).

After a trial lasting four weeks the jury returned a verdict of guilty and assessed damages at $120,000 (R. 2125). The district court overruled respondents' motions for a new trial and for judgment *non obstante veredicto* and entered judgment on the verdict (R. 2199). This judgment was reversed solely on the ground that petitioners' proof of damages was incompetent because they did not prove earnings in an "open market" for comparison with what they earned under the illegal system (R. 2272).

Since such proof was impossible because respondents by their illegal conspiracy had destroyed an open market, the sole question presented is whether the evidence before the jury was competent as the best available proof of damages.

(b) The Parties.

The four petitioners as partners have been the owners of the Jackson Park Theatre, a motion picture theatre on the south side of Chicago, since November 1, 1936, when they acquired it from their parents, Edward L. and Marie C. Bloom. (R. 108).

Respondents RKO Radio Pictures, Inc., Loew's, Incorporated, Twentieth Century-Fox Film Corporation, Paramount Pictures, Inc. and Vitagraph, Inc., are distributors of motion picture films. They are hereinafter referred to respectively as RKO, Loew's, Twentieth Century-Fox, Paramount and Vitagraph.

Respondent Balaban & Katz Corporation, hereinafter referred to as B&K, is a motion picture exhibitor which operates fifty-four theatres in Chicago and its suburbs, including the Tivoli, Tower and Maryland theatres on the south side of Chicago, which are involved in this case. B&K is a subsidiary of Paramount Pictures, Inc. (R. 732), hereinafter referred to as Paramount.

Respondent Warner Bros. Circuit Management Corporation is an exhibitor which operates twenty-three theatres in Chicago, including the Avalon, Jeffery and Hamilton theatres on the south side of Chicago, which are involved in this case. Warner Bros. Circuit Management Corporation and Vitagraph are subsidiaries of respondent Warner Bros. Pictures, Inc. Respondent Warner Bros. Theatres, Inc. is also affiliated

with Warner Bros. Pictures, Inc. and holds title to certain of the Warner theatres. All the Warner companies are hereinafter collectively referred to as Warner.

(c) The Conspiracy Proven.

Petitioners proved that respondents maintained in the Chicago District by conspiracy among themselves a system of distributing motion pictures for showing in successive weeks of release (R. 2265, 2266, 2270).

This system was designed "primarily" to benefit a so-called Loop or first run in the downtown entertainment district of Chicago (R. 936-937) in which new pictures were shown exclusively in theatres owned by B&K and RKO (R. 368, 369). No other theatre in the entire Chicago District could show those pictures until three weeks after the conclusion of the Loop run (Pfs.' Ex. 46; R. 436, 1597, 1637-1640). The system then provided for showings in successive weeks, called A pre-release, B pre-release and C pre-release, and weeks of general release. The A run comprised the fourth, fifth and sixth weeks following the Loop run and in it pictures could be shown only in A pre-release theatres, all of which were owned by B&K and Warner (Pfs.' Ex. 45; R. 432, 1595; Warner Ex. 12; R. 432, 2065; Pfs.' Ex. 92; R. 498, 1761-1776). The B run comprised the seventh and eighth weeks and the C run the ninth week following the Loop run (R. 370-376).

After the C run came weeks of general release. Under respondents' system petitioners' theatre was arbitrarily assigned (R. 142, 143, 148, 153-155, 291, 985) a playing position in first week of general release, being ten weeks after the conclusion of the Loop run (R. 148; Pfs.' Ex. 46; R. 436, 1597, 1643). Petitioners could not even bid for, much less obtain, pictures for exhibition at an earlier date (R. 142, 143, 148, 153, 154, 155, 291, 985), and they were thereby

prevented from showing pictures until after they had been shown in all of respondents' comparable and competing theatres (R. 944; Pfs.' Ex. 46; R. 436, 1597, 1642, 1643; Pfs.' Ex. 54; R. 487, 1722, 1728, 1729; Pfs.' Ex. 144; R. 569, 2001, 2014).

Petitioners' theory of the proof was, and the jury by its general verdict found, that respondents had and maintained a monopoly in the prior Loop run and A pre-release weeks by joining in a price-fixing scheme to stop the competition of the subsequent run theatres. The motive of respondent exhibitors was to maintain high fixed admission prices in their Loop and pre-release theatres; the motive of respondent distributors was to share in the box office receipts of these high admission-price theatres by virtue of percentage contracts with respondent exhibitors. The runs[1] and clearances[2] were all designed to maintain these fixed prices by suppressing the competition of theatres such as petitioners'. In other words, the entire system of release was and is part and parcel of a price-fixing scheme and therefore illegal *per se* under the Sherman Act. The illegal suppression of petitioners' competition is an obvious cause of damage to their business.

In Order to Buy Pictures Petitioners Had to Go to Their Competitors.

Petitioners' Jackson Park Theatre is located on Stony Island Avenue near 67th Street in Chicago. It has 1458 seats (R. 162).

The other theatres principally mentioned in the case belong to one or another of respondent exhibitors. They are located within a radius of two miles from the Jack-

1. "Run" as used in this brief denotes the playing position or time during which a picture is played in a theatre.

2. "Clearance" means the time elapsing between the conclusion of one "Run" and the beginning of another.

son Park Theatre and are in competition with it. The name, operator, seating capacity, location and run assigned to each of said theatres is as follows:

Name	Operator	Seats	Location	Run
Tivoli	B&K	3474	6325 Cottage Grove Ave.	A-PR[3]
Tower	B&K	2995	1520 E. 63rd St.	B-PR
Maryland	B&K	1499	855 E. 63rd St.	C-PR
Avalon	Warner	2385	1645 E. 79th St.	A-PR
Jeffery	Warner	1804	1952 E. 71st St.	C-PR
Hamilton	Warner	999	2150 E. 71st St.	2G[4]

(Pfs.' Ex. 156-A; R. 578, 1060, 2059).

So that the Court may visualize the relative locations of these theatres, we have included, on the opposite page, a map which was prepared by counsel for respondents for use in the circuit court of appeals.

After purchasing their theatre, petitioners as motion picture exhibitors entered into competition with the B&K chain (R. 215), and also with the Warner chain (R. 214, 215), both of which are subsidiaries of distributors (R. 732, 673-675, 416, 1128).

In its immediate vicinity the Jackson Park Theatre competes with the B&K Tivoli, Tower and Maryland Theatres (R. 205, 214) and with Warner's Avalon, Jeffery and Hamilton (R. 204, 205, 206, 766). Petitioners' theatre also competes with the Loop theatres most of whose patronage is drawn from the various residence districts of the city (R. 104a).

The B&K chain owns all of the Loop first-run theatres except the Palace and the Grand (R. 368, 369; Pfs.' Ex. 45; R. 4[illegible], 1595) which are owned by RKO (R. 368). Other

3. Pre-release.
4. Second week of general release.

LAKE MICHIGAN
BURNHAM PARK
HYDE PARK
SHORE DRIVE
0
1
2
SCALE IN MILES
1. Jackson Park
2. Tivoli
3. Tower
4. Maryland
5. Avalon
6. Jeffery
7. Grove
8. Shore
9. Hamilton

Loop theatres are not first-run theatres (R. 424; Pfs.' Ex. 46; R. 436, 1597, 1640).

Respondent distributors received under percentage contracts (R. 351, 371, 679, 824, 908) as much as 70% of the net receipts of the Loop run theatres, in which B&K and RKO thus had a monopoly (R. 368, 369; Pfs.' Ex. 46; R. 436, 1597, 1615, 1637-1639).

The B&K chain owns the A pre-release theatres except the Avalon and Capitol (Pfs.' Ex. 45; R. 432, 1595) which are owned by Warner (Warner's Ex. 12; R. 1031, 2065). Petitioners' evidence shows (R. 180) and the fact was conceded by respondents (R. 420) that no theatre could be operated in the Chicago District without the pictures of respondent distributors.

It thus appeared at the threshold of the case that in order to buy pictures necessary for the operation of their theatre petitioners had to go either to their competitors (R. 732, 985) who had a monopoly of the Loop and A run theatres, or to distributors who shared respondent exhibitors' box office receipts (R. 351; Pfs.' Ex. 155; R. 573, 1160, 2052-2058), and who thus had a uniform, manifest and admitted interest and motive in suppressing petitioners' competition with respondents' theatres (R. 717, 718, 909, 933, 935, 937).

How Respondents' Conspiracy Affected Petitioners' Theatre.

The Jackson Park Theatre was built in 1917. It was the first large theatre on the south side of Chicago, and during the years 1918 to 1924 it was able to buy pictures ahead of the Maryland and the Jeffery (R. 169, 170, 311-313), and at one time ahead of all theatres then existing in the district (R. 311-312, 205, 410).

However, as early as 1925 (R. 410, 169, 170), the Jackson Park Theatre had been unable to buy pictures from respondent distributors until after the circuits had been sold (R. 170, 171, 282, 429, 430). The B&K circuit built the Tivoli in 1922 (R. 410) and later acquired the Tower Theatre (R. 205). The Warner circuit acquired the Avalon in 1930 (R. 206, 323).

Sometime prior to 1927 (R. 540, 708), and as a development of the persistent refusal of respondent distributors even to negotiate with individual exhibitors until the circuits had been sold, those distributors set up in Chicago the system of release described at pages 4 and 5 of this brief (R. 623, 636, 667, 681, 710, 714, 839-840, 899-900). It gave to B&K's theatres the prior runs of pictures and moved back the playing position of the Jackson Park (R. 244, 312, 623) by establishing a three weeks' waiting time immediately following the Loop run (R. 351, 717, 718) during which time no theatre in the Chicago District could play the pictures which had been shown in the Loop. It also changed the other clearances and moved the Jackson Park further behind the conclusion of the runs at the Tivoli and the Avalon (R. 169-170, 311-313) and discriminated in the granting of runs and clearances in favor of respondents' circuits (R. 169-170, 171, 206, 323).

The prior buying privilege granted to the circuits and maintained by the conspiracy between the distributors (R. 337, 339, 379, 380, 386, 391, 392, 430, 490, 837, 904, 998, 1015) continues to this day (R. 430, 929). Under it respondents set the run, clearance, system of release and minimum admission prices for every theatre in the Chicago District (R. 712, 837, 929, 960; Pfs.' Ex. 69; R. 495, 1780-1796, 998, 1011, 1015) and even for theatres not yet built (R. 839-840, 851).

Petitioners' theafre had a better location than any of the B&K theatres in its district (R. 164, 165, 1139-1143) and was comparable in all other respects to its closest competitors, the B&K Maryland and Warner's Jeffery (R. 1132-1136). Nevertheless, both of those theatres were, under the Chicago system of release, granted pictures a week earlier than petitioners (R. 944; Pfs.' Ex. 46; R. 436, 1597, 1642, 1643; Pfs.' Ex. 54; R. 487, 1722, 1728; Pfs.' Ex. 92; R. 498, 1761, 1774; Pfs.' Ex. 144; R. 569, 2001, 2014).

It was admitted that no theatre had a "vested interest" (R. 713) in a playing position (R. 337, 339, 378, 714, 1093). Nevertheless, fixed playing positions were maintained year after year by contracts between B&K and Warner as exhibitors and the respondent distributors (R. 904, 924; Pfs.' Ex. 46; R. 436, 1597, 1637-1644; Pfs.' Ex. 116; R. 500, 1869, 1879-1890; Pfs.' Ex. 121; R. 501, 1931-1932). These contracts specified minimum admission prices (exclusive of tax) of 75c in the Loop (R. 351, 926), 50c in the A runs, 40c in the B runs, 30c in the C runs and 25c in the first week of general release (R. 681-682, 836-837, 906).

Price Fixing Was Maintained by Conspiracy as an Integral Part of the System of Release.

Respondent distributors' witnesses, though professing that the distributors were competitors among themselves, admitted that each knew all the others were using the same system of release, and fixing the same playing position for the same theatres, with the same minimum admission prices which changed at the same periods of the day and carried the same clearance provisions in the same successive runs (R. 342, 709, 711, 716, 839, 840, 899, 902, 923, 946, 1027, 1091). Each distributor's license contracts contained forfeiture provisions in almost identical wording, forfeiting the run in the event that the minimum admission price

schedule was not observed (R. 193-196, 198, 199, 201, 489, 493, 495, 839). Each witness admitted he knew that the purpose of the system was to suppress the competition of the subsequent run theatres (R. 351, 352, 370, 371, 396, 679, 682, 718, 735, 908) and thus preserve the high admission prices in the Loop and pre-release runs (R. 933). James Coston, the manager of Warner's theatres, covered the whole field of knowledge by saying there are "not many secrets in the picture business" (R. 1096). Allen Usher, a district manager for Paramount, when asked how his company could fix the same run for any given theatre at the same admission prices as the other distributors without exchanging information with them, replied that "the industry knows" (R. 342).

It was admitted that the minimum admission price schedule was an integral part of the system of release (R. 351, 371-375, 396, 489, 649, 681, 716, 735, 909) and the contracts show the same thing (Pfs.' Ex. 46; R. 436, 1597, 1637-1644, Pfs.' Ex. 54; R. 487, 1722-1734). It was admitted that the B&K and Warner clearance contracts assigned some three hundred independent theatres (R. 655; 675), which competed with respondents', to inferior and subordinate playing positions (R. 711, 998), and that such contracts were always negotiated before any of the distributors would entertain negotiations with any theatre not affiliated with respondents' chains (R. 339, 378, 380, 390, 391, 392, 430, 837, 904, 928).

Price Fixing Was the Motive for the Suppression of Competition Under the System of Release.

John E. Flynn, western sales manager of Loew's, a respondent distributor, testifying on cross-examination, characterized the extent, purpose and effect of price fixing as follows (R. 936-937):

Q. Your minimum admission price here in the Loop is what?

A. Seventy-five cents, first run.

Q. And you want to protect that, you say?

A. Yes.

Q. And to protect it, what do you mean, protect it from what?

A. Protect it from their reducing the price below that figure.

* * * * * *

Q. Let us take the theatre that you are protecting. What are you protecting it from?

A. From reduced admission prices, which would be ruinous.

Q. So you fix the price in the next run, don't you, so that it won't be below a certain amount?

A. We do that.

Q. And that is for the purpose of protecting that 75-cent admission in the Loop, isn't it?

A. Primarily.

Q. And when you set an admission price of 50 cents in the A run, in order to protect that 50-cent admission price, you have to fix a minimum in the next succeeding run, don't you?

A. Yes, we do.

Q. And in order to get your 40 cents in your B run, you have got to fix a minimum admission price in the next one, don't you?

A. For each run.

Q. You sell your pictures in the Loop on a percentage basis, don't you?

A. Yes.

Q. So you are interested, along with Balaban & Katz, in what is taken out of the Loop box office, aren't you?

A. We are interested in our participation.

Admitting causation between fixing the admission prices and suppressing the competition of the subsequent run theatres, Clyde W. Eckhardt, a district manager for Twentieth-Century-Fox, testified on cross-examination as follows (R. 717, 718):

Q. What is the purpose of the 21 days [between the Loop and the A run]?

A. To protect the engagement downtown and get the most revenue at the box office possible out of the picture at the admission price.

Q. At the set admission price in the Loop?

A. Yes, sir.

Q. And the purpose of that is to stop the competition of any other theatre with your Loop run, isn't it?

A. Yes, sir.

• • • • •

Q. Now, why is that admission price inserted in your A run?

A. *That is to restrain any competition playing at a lesser admission than that particular price.*

Allen Usher, a district manager for Paramount, affirmed this even more concretely in his deposition, testifying as follows (R. 351):

Q. Now, the period of clearance, the three weeks' waiting time after the conclusion of the Loop run, the 21-day period which you referred to, that is designed to protect the Loop theatre from competition with the outlying theatres, isn't that the fact?

A. We grant 21 days' clearance on the first subsequent runs when we negotiate first run contracts for the Loop.

Q. And that is for the protection of the Loop theatre *against the competition of the outlying theatres*, is it not?

A. *Because of the high admission, yes.*

Q. But you have an interest in obtaining high admissions because you are sharing on the intake of the picture?

A. That is right.

The reviewing court held that on the foregoing proof the district court was justified in holding as a matter of law that respondents' system of release was illegal. (R. 2270, 2271.) As we shall show, the illegal system was intended to and did proximately cause damage to petitioners by preventing them from obtaining pictures early enough to compete successfully for patronage against respondents' comparable theatres.

(d) Petitioners' Proof of Damages.

Two methods of determining petitioners' damages resulting from the illegal conspiracy support the verdict, and it is petitioners' contention that the jury could use either method, or a combination of both, in reaching that verdict.

The first method presents a comparison, after an adjustment for higher film rental in the earlier run, of the receipts of petitioners' theatre during the period embraced in this suit with the receipts of respondents' competing Maryland and Jeffery Theatres as an approximation of the increased earnings which petitioners' theatre would have made had it been permitted to bid for run and clearance in an open market.

The second method is by comparison of the earnings of petitioners' theatre under single features with its decreased earnings after respondents had illegally extended their system by double featuring, thus using under their contracts pictures which petitioners had theretofore been able to buy free of the restrictions of the illegal system.

(1) *The Increase in Earnings Which Petitioners Could Have Made in an Open Market Was Approximated by Competent Proof.*

The record shows that for seventeen years petitioners and the prior owners of the Jackson Park Theatre sought unsuccessfully to negotiate with respondent distributors for earlier pictures (R. 142, 147, 148, 153, 154, 155, 288-291), and the fact that petitioners sought to compete for a better playing position was admitted by respondents' own witnesses. (R. 985, 1078, 686.) It further appears that petitioners were ready and willing at all times to pay more film rental for earlier pictures than either the Maryland or the Jeffery Theatre was paying (R. 112, 124, 139, 178, 179) and that the reason petitioners were able to do this was because they owned their theatre free and clear and so had no rent to pay. (R. 123, 593, 594.)

Throughout the case respondents' counsel have indulged their speculation as to what pattern of runs and clearances might have evolved had petitioners been permitted to buy earlier pictures. However, the only proof in the record is the testimony of James J. Donohue, a respondents' witness, who said that to permit the Jackson Park and the Maryland to play in the same run with the Jeffery would split the patronage and would not be permitted by even competing distributors (R. 685), and that even in a competitive market either the Jackson Park or the Maryland, but not both, would play pictures on a parity with the Jeffery. He further testified that, as between comparable theatres in an *open market*, the distributors would choose for the prior run the theatre "that has the better location because it has been my experience that that is probably the most important factor, certainly one of the most important factors." (R. 686.)

The jury had ample evidence on which to find that peti-

tioners' theatre had a better location than did the Maryland (R. 164, 165, 243, 1139, 1143, 1132-1136), that the Jeffery was "about on a par" with the Jackson Park (R. 1140) and that the latter had a better location than any B&K theatre in the entire competitive district. (R. 1139-1141, 1142, 1143.) In describing the location of the Maryland petitioners' witness Malooly, in a masterpiece of understatement, testified, "The great many taverns that exist or are in operation along 63rd Street to my mind would be a detracting influence for women and children going to and from the movies." (R. 1139.)

During the period embraced in this suit the Maryland was operated under a lease whereby it had to pay a rent of $75,000 a year (Pfs.' Ex. 44; R. 482, 1593), which resulted in an annual loss to it of approximately $50,000. (R. 482.) Nevertheless it was kept in a playing position ahead of petitioners' theatre. It is quite apparent that in an open market and divorced from the chain buying privilege of B&K, the Maryland could never have bid for and bought a playing position ahead of petitioners. When an open market had existed, petitioners had been able to buy pictures ahead of both the Maryland (R. 312) and the Jeffery (R. 170).

The foregoing is the only proof in this record showing what would have happened in an open market to the pattern of runs and clearances in petitioners' competitive district.

Donohue's statement was tantamount to an admission that in an open market or under any conceivable kind of competitive system petitioners could have bought from competing distributors *on a parity with the Jeffery and ahead of the Maryland*. There was no evidence from which the jury could find otherwise than that distributors not combined in a conspiracy would have sold a playing position to petitioners' theatre on the basis of its superior location.

Donohue also testified that under such a pattern of runs petitioners' theatre and the Jeffery would have "split" the patronage at the same playing position. (R. 738.) This patronage had actually been shared by the Maryland and the Jeffery during the time involved.

Analyzing the records of cash admissions of the three theatres during the period involved (R. 538; Pfs.' Ex. 47; R. 466, 1712; Warner Ex. 16; R. 1037, 2071) we find:

Year	Jackson Park	Maryland	Jeffery	Excess of Maryland over Jackson Park	Excess of Jeffery over Jackson Park
			ADMISSIONS		
7/28/37-12/31/37 (Pro-rated)	$ 44,038.34	$ 63,294.55	$ 82,517.50	$ 19,256.21	$ 38,479.16
1938	92,934.83	124,339.09	164,280.70	31,404.26	71,345.87
1939	88,490.81	130,194.54	156,574.80	41,703.73	68,083.99
1940	83,772.77	127,986.01	157,146.75	44,213.24	73,373.98
1941	89,778.40	120,605.81	154,915.56	30,827.41	65,137.16
1/1/42-7/27/42 (Pro-rated)	54,360.80	74,476.48	87,867.20	20,115.68	33,506.40
	$453,375.95	$640,896.48	$803,302.51	$187,520.53	$349,926.56
			FILM RENTAL		
7/28/37-12/31/37 (Pro-rated)	$ 10,597.19	$ 18,717.54	$ 18,041.70	$ 8,120.35	$ 7,444.51
1938	26,299.94	41,478.93	43,981.02	15,178.99	17,681.08
1939	27,134.10	40,420.97	43,863.70	13,286.87	16,729.60
1940	27,521.94	42,448.35	45,699.96	14,926.41	18,178.02
1941	27,185.74	40,104.99	43,109.39*	12,919.25	15,923.65
1/1/42-7/27/42 (Pro-rated)	14,773.82	21,880.14	24,566.20*	7,106.32	9,792.38
	$133,512.73	$205,050.92	$219,261.97*	$ 71,538.19	$ 85,749.24
			EXCESS OF ADMISSIONS OVER FILM RENTAL		
	$319,863.22	$435,845.56	$584,040.54	$115,982.34	$264,177.32

*Estimated on the basis of 1936-1940 average. (R. 538.)

"Splitting" the excess admission figures, $115,982.34 and $264,177.32, gives $190,079.83 of increased earnings which the jury had a right to find petitioners' theatre

would have enjoyed except for respondents' wrongdoing. In reaching this figure the jury had only to apply the formula advanced by the testimony of Donohue. (R. 738.) Since the jury limited their verdict to $120,000, their computation would have permitted the distributors to make over $70,000 in additional film rental if they had sold pictures to the Jackson Park in a run ahead of the Maryland.

Richard Salkin, testifying from the experience of 25 years in the business, said he could have doubled the Jackson Park's admissions with earlier pictures (R. 263). With so large a spread in these figures any conceivable sort of error in computation would be absorbed by a large margin, and the jury was therefore well within its province in determining that, could petitioners' theatre have obtained earlier pictures, it would have earned at least $120,000 in excess of what it actually did earn.

(2) *The Damages Caused by Illegal Double Featuring.*

The illegal nature of respondents' double featuring, and its effect on petitioners' business, were described by the reviewing court as follows:

> "Appellants contend that there was no evidence which supports the general finding of the jury that double features were introduced by them as a part of their conspiracy, as alleged. What we have heretofore said with respect to proof of conspiracy need not be repeated. It is sufficient to say that neither the sale nor use of double features is illegal *per se*, but if the sale or use is a part of an illegal conspiracy, such as here alleged, every element used for the purpose of accomplishing the intended result of such illegal conspiracy becomes tainted with illegality. It is the intended result of such use which renders it illegal, not the thing *per se*, nor its use without such intended result.
>
> "The record discloses that prior to the use of double

featuring, plaintiffs' theater was always able to buy some product that had not already been shown by defendants' theaters, and this was available free of the restrictions of the Chicago system of release. That product was taken away by defendants' prior contracts, made pursuant to and as a part of the conspiracy, and placed under the restriction of the illegal system, and thereafter was not obtainable by plaintiffs, except by use of the illegal system. The general verdict of the jury, in effect, finds this evidence to be true, and we cannot disturb it." (R. 2274.)

In spite of the illegal conspiracy, the Jackson Park Theatre averaged profits of $44,000 a year during four years prior to July 28, 1937 (R. 476) even though they were for the most part depression years. At about the time when petitioners bought the Jackson Park Theatre general business conditions began to improve very noticeably (R. 848). At or about the same time (R. 144) B&K and Warner, pursuant to the conspiracy to suppress the competition of independent theatres, contracted for sufficient pictures for the 1936-1937 season to institute "double features" in their pre-release theatres (R. 1089).

B&K in November, 1936 (R. 854-855) and Warner in August, 1937 (R. 1087) began to play more pictures in their pre-release houses (R. 854, 855, 1083-1089; Pfs.' Ex. 45; R. 432, 1595). The effect of this was to make more complete the suppression of competition by virtue of the system of release (R. 174, 211, 847). Thus, prior to double featuring, B&K and Warner, the immediate competitors of petitioners, who played pictures on prior release dates, used under the system of release only about half as many pictures as they did after the policy of double features was instituted (R. 145, 211, 849, 854, 174, 350). As a result of this policy all available pictures were played in respondents' theatres ahead of the time when petitioners were permitted

to show them (R. 174). To use the language of the trade, the box office appeal was "milked" (R. 133, 856) more effectively by the system as respondents used more pictures (R. 174, 211, 847) ahead of the Jackson Park.

Subsequent to July 28, 1937 both B&K and Warner were using more pictures in their competing theatres and as a consequence the earnings of petitioners' theatre started down. (R. 174; Pfs'. Ex. 48; R. 466, 1713; Pfs'. Ex. 49; R. 465, 1714.) At the same average as the four years preceding respondents' illegal double featuring those earnings should have totalled for the period embraced in this suit the sum of $220,000. (R. 476.) Actually, despite the fact that more theatre patrons were now available, the earnings totalled only $94,340.01 (R. 476), leaving a difference of $125,659.99 as a loss in comparison with the prior period mentioned. (R. 476.)

As to this proof the reviewing court said:

> "One method of attempting to prove damages was by a comparison of the average profit of plaintiffs' theater during a four-year period preceding July 28, 1937, with its lessened profits during the five years immediately following that date. The difference was in excess of $120,000 *and such evidence if pertinent would support the verdict under the first theory.*" (R. 2269.) (Italics supplied.)

The average used as a standard for comparing subsequent earnings *represented earnings made in petitioners' theatre prior to the time when respondent exhibitors were all using double features in their competing theatres.* (R. 1085-1087.) The difference represented the loss attributable to the extension of the illegal system through double featuring. (R. 174.) It was not only "pertinent"; it was the only possible way in which the damages caused by illegal double featuring could ever be proved.

(e) *The Issue Presented Here.*

The sole question presented on this record is whether the foregoing proof of petitioners' damages was competent evidence. If it was, the circuit court of appeals conceded that its duty was to affirm the judgment entered by the district court (R. 2271). The reviewing court held it incompetent on the ground that the only measure of damages which could be used was the difference between what the theatre earned under the illegal system and what it could have earned in an open market as shown by proof of actual earnings by a theatre operated in an open market (R. 2272).

The illegal system had wholly monopolized the Chicago District for at least fifteen years (R. 540, 708, 141-143, 146-149, 151-156, 203, 287, 294), and *respondents' acts made impossible any proof of earnings in any theatre in an open market which could be used to make the comparison required.*

Under these circumstances petitioners contend that the decisions of this Court make their proof of damages competent because it was the best available. The decision of the reviewing court to the contrary has the result of rewarding respondents for the effectiveness of their system in completely destroying an open market.

The public interest involved is apparent because a conspiracy which has been held to constitute a violation of the antitrust laws, and which prevents any theatre from making any earnings in an "open market", *must be continuously maintained by respondents in order to prevent proof of "open market" earnings which could be used as the basis for the recovery of damages by their victims.*

SPECIFICATION OF ASSIGNED ERRORS.

Petitioners here urge the errors assigned in their petition for writ of certiorari. They are, that the Circuit Court of Appeals for the Seventh Circuit erred:

1. In setting aside a jury's verdict fixing petitioners' damages at $120,000 on the ground that there was no proof of those damages.

2. In stating that petitioners had abandoned their application for an injunction, when the record shows that the district court has retained jurisdiction over the equity branch of the case.

SUMMARY OF THE ARGUMENT.

I. The Chicago system of release is shown by the record and has been found by a jury and the circuit court of appeals to have been created and maintained by a conspiracy between respondents which is illegal *per se*. The inquiry here is limited to whether there is any evidence that respondents participated in "a plan the necessary consequence of which if carried out was restraint of interstate commerce". The evidence shows that respondents' contracts were illegal because they fixed minimum admission prices in all the motion picture theatres in Chicago. These contracts were negotiated and executed by respondents prior to the time when any independent theatre owner was permitted to negotiate and fixed the runs, clearances and admission prices of some three hundred independent theatres. The proof of conspiracy was conclusive and the verdict cannot be set aside on the weighing of inferences because that was within the exclusive province of the jury, and the circuit court of appeals made the only ruling possible when it said the verdict of conspiracy was supported by substantial evidence.

II. There is substantial evidence of damages and the amount thereof, and under the decisions of this Court it was the duty of the circuit court of appeals to affirm the judgment. There is substantial evidence of the fact of damage caused by petitioners' exclusion from an open market because in such a market they could have bought pictures in an earlier run on a parity with the Warner Jeffery and ahead of the B&K Maryland, and the earlier pictures meant more box-office receipts to petitioners. A

comparison of the net receipts of the Jeffery and the Maryland with those of the Jackson Park shows that petitioners could have increased their earnings by more than $120,000 had they been able to bid for run and clearance in an open market. In addition, there is substantial evidence of the fact of damage caused to petitioners when respondents placed all pictures under the restrictions of the illegal system by double-featuring. The amount of this damage is shown by a comparison of the earnings of petitioners' theatre when operating under single features with what it made under double features. This difference also exceeds $120,000 and represents loss caused to petitioners by respondents' illegal double featuring. The circuit court of appeals erred in holding petitioners' evidence of damages irrelevant on the ground that open market earnings must be used as a basis for comparison because respondents by their illegal conspiracy had destroyed all such earnings for all theatres in the Chicago District. In view of this fact petitioners' evidence became relevant and competent as the best proof of damages which was available. The reviewing court's opinion to the contrary is against public policy because it encourages continuance of the illegal conspiracy.

III. The circuit court of appeals by its construction of the verdict deprived petitioners of their right to a jury trial. The jury were permitted by the instruction tendered by respondents themselves to find a general price-fixing conspiracy which had three objects: (1) to create a system of release; (2) to discriminate in the granting of a run in favor of respondents' theatres so that petitioners could not obtain pictures earlier than ten weeks after the conclusion of the Loop run, and (3) to institute double features. The jury could find such a conspiracy to exist and could find respondents guilty of one or more of its objects.

"One or more" includes all of them. The jury did not have to choose between theories in assessing damages, and the only limitation on the amount of their verdict was the evidence in the case and the $120,000 named as the *ad damnum* in the complaint. The amount of the verdict therefore furnished no clue as to the rationale of the jury. The reviewing court therefore could not construe issues out of the case without depriving petitioners of their right to a jury trial, and since it found substantial damages under the second object of the conspiracy it could not enter judgment *non obstante veredicto*. The reviewing court's attempt to substitute its own opinion on the evidence usurps the functions of the jury.

IV. Contrary to the statement of the reviewing court, the injunction issue was not abandoned by petitioners but is still pending in the district court. For this reason the reviewing court had no jurisdiction over that issue and its remarks regarding it should be stricken.

ARGUMENT.

I.

The Chicago System of Release is Shown by the Record and Has Been Found by a Jury and the Circuit Court of Appeals to be Illegal Per Se.

Since the jury found that respondents were engaged in a price-fixing scheme concerned with the exhibition of motion picture film which is in interstate commerce, and is an integral part of respondent distributors' system of release, it must follow as a matter of law that respondents' contracts setting up their system of release are invalid under the antitrust laws.

We should be content to rest this statement on the concurring findings of the district court and the circuit court of appeals except for the fact that an unlimited grant of the writ of certiorari apparently permits respondents to argue, in order to sustain their judgment in the circuit court of appeals, that there is no proof of conspiracy. For this reason we feel that even at the expense of brevity we cannot exclude this issue from our argument.

(a) *There Was Conclusive Evidence of a Price-fixing Conspiracy Before the Jury.*

The jury by their general verdict rendered under instructions so conditioning the consideration of this issue (R. 1265, 1266, 1269, 1271, 1275) found price fixing to be an inseparable part of the B&K and Warner clearance contracts which created the Chicago system of release.

As the district court put it in characterizing petitioners'

position (R. 1167), "The whole thing is anchored upon the proposition that it is engineered and controlled and run by the fact that prices are fixed".

At the trial respondents took no exception (R. 1188) to an instruction which stated the rule to be followed by the jury in judging the sufficiency of the proof in this kind of case. The instruction told the jury that an unlawful conspiracy may be formed without simultaneous action or agreement on the part of the conspirators, and that knowing participation by competitors without previous agreement in a plan the necessary consequence of which if carried out is unreasonable restraint of interstate commerce is sufficient to establish an unlawful conspiracy under the Federal antitrust laws. (R. 1266.)

This instruction stated the requirements of proof for a price-fixing conspiracy formulated in *United States* v. *Masonite Corp.*, 316 U. S. 265. The trial court had found that (p. 275):

> "• • • in negotiating and entering into the first agreements each appellee, other than Masonite, acted independently of the others, negotiated only with Masonite, desired the agreement regardless of the action that might be taken by any of the others, did not require as a condition of its acceptance that Masonite make such an agreement with any of the others, and had no discussions with any of the others."

In spite of this finding this Court held as a matter of law that the facts shown by the record proved conspiracy, saying (p. 275):

> "It is not clear at what precise point of time each appellee became aware of the fact that its contract was not an isolated transaction but part of a larger arrangement. But it is clear that as the arrangement continued each became familiar with its purpose and scope. Here as in *Interstate Circuit* v. *United States*, • • • 'It was enough that, knowing that concerted

action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it.' * * * 'It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. * * * Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.' "

This Court further said (p. 274):

"For there is one phase of the case which is decisive. That is the agreement for price-fixing. * * * there can be no doubt that this is a price-fixing combination which is illegal *per se* under the Sherman Act."

By this decision the inquiry here is limited to whether or not there is any evidence that respondent distributors and exhibitors, who are ostensibly competitors, participated in "a plan the necessary consequence of which if carried out was restraint of interstate commerce."

The uncontradicted proof shows that each respondent distributor tendered to the exhibitors as a "classification of price and admission" (R. 837, 648, 649, 836) the same minimum admission prices in a schedule of Chicago release. (R. 193, 194, 195, 196, 198, 199, 201, 489, 493, 495; Pfs.' Ex. 46; R. 436, 1627, 1632; Pfs.' Ex. 54; R. 487, 1722; Pfs.' Ex. 69; R. 495, 1780; Pfs.' Ex. 78; R. 497, 1797; Pfs.' Ex. 116; R. 500, 1869, 1876, 1890; Pfs.' Ex. 118; R. 501, 1913, 1922, 1926; Pfs.' Ex. 122; R. 502, 1935, 1936, 1956, 1957; Pfs.' Ex. 144; R. 569, 2001, 2006, 2012, 2038.) Each distributor refused even to negotiate with petitioners until after a contract had been signed with respondent exhibitors which fixed the run of every

independent theatre in Chicago (R. 337, 339, 378, 380, 386, 391, 392, 430, 490-491, 837, 904, 928, 944, 998, 1015); each distributor then ascribed these contracts as the sole reason for refusing to sell an earlier playing position to petitioners. (R. 142, 147, 148, 153, 288, 291, 985.)

The B&K and Warner clearance contracts with each distributor used almost identical wording in setting up the system of release. (Pfs.' Ex. 46; R. 436, 1597, 1632; Pfs.' Ex. 54; R. 487, 1722, 1723; Pfs.' Ex. 69; R. 495, 1780; Pfs.' Ex. 78; R. 497, 1797; Pfs.' Ex. 116; R. 500, 1869, 1876, 1890; Pfs.' Ex. 119; R. 501, 1922; Pfs.' Ex. 120; R. 501, 1926; Pfs.' Ex. 122; R. 502, 1935, 1936; Pfs.' Ex. 126; R. 503, 1940, 1956, 1957; Pfs.' Ex. 144; R. 569, 2001, 2006, 2012, 2038.) Each distributor's witnesses admitted (R. 342, 710, 711, 716, 839, 840, 899, 903, 923, 946, 1027, 1091) and the contracts showed that each respondent knew its clearance contract with respondent exhibitors was not an isolated transaction *but part of a larger arrangement because it was labelled as a "Protection Schedule for City of Chicago Release"* or "Schedule of Clearance and Admission" (Pfs.' Ex. 54; R. 487, 1722, 1723; Pfs.' Ex. 118; R. 501, 1913, 1917).

Each distributor admitted knowledge of and familiarity with the terms, scope and purpose of the system of release (R. 681, 899, 903, 923, 946, 1027, 1091); each admitted that its necessary consequence and intended effect were restraint of interstate commerce and suppression of competition (R. 351, 352, 370, 371, 396, 679, 682, 718, 735, 908); each distributor gave its adherence to the plan and participated in it (Pfs.' Ex. 46; R. 436, 1597, 1632; Pfs.' Ex. 54; R. 487, 1722, 1723; Pfs.' Ex. 69; R. 495, 1780; Pfs.' Ex. 78; R. 497, 1797; Pfs.' Ex. 116; R. 500, 1876, 1890; Pfs.' Ex. 119; R. 501, 1913, 1922; Pfs.' Ex. 120; R. 501, 1926; Pfs.' Ex. 122; R. 502, 1935, 1936; Pfs.' Ex. 126; R. 503, 1940,

1956, 1957; Pfs.' Ex. 144; R. 569, 2001, 2006, 2012, 2038); each joined it knowing that all the other distributors were using it (R. 342, 710, 711, 716, 839, 840, 899, 903, 923, 946, 1027, 1091) and that concerted action was contemplated (R. 717, 718) and in fact was absolutely necessary in order to make the plan work, *and each by virtue of a percentage share in the box office receipts of B&K and Warner's prior run theatres* (R. 351; Pfs.' Ex. 155; R. 573, 1160, 2052) *had a motive to maintain the monopoly price of admission, which admittedly and obviously could not be maintained except in the absence of competition between the distributors* (R. 104-A) *and by the suppression of the competition of the subsequent run theatres* (R. 717, 718).

As this Court said in *Interstate Circuit* v. *United States*, 306 U. S. 208, 226:

> "It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it."

It matters not at all, and has no legal significance whatever, whether the respondent exhibitors or distributors originated the plan. The proof shows that, whichever respondent invited participation, the other respondents gave it, and the terms of their participation are written largely and unmistakably into their contracts. On the whole record it appears not only that there was substantial evidence of conspiracy but that that evidence was so conclusive that no jury could have mistaken its significance or reached any other conclusion.

(b) *A Conspiracy Fixing the Price of Admission to See a Copyrighted Film Is Not Saved From Illegality by Any Copyright Privilege.*

In *Interstate Circuit* v. *United States*, 306 U. S. 208, in dealing with the fixing of minimum admission prices for exhibitors of copyrighted motion picture film, this Court said (p. 232):

> "The consequence of the price restriction, though more oppressive, is comparable with the effect of resale price maintenance agreements, which have been held to be unreasonable restraints in violation of the Sherman Act."

In *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 721, this Court cited the *Interstate* case as authority for the illegality of price fixing by copyright holders.

Here, the only thing the distributors had to sell was the right to exhibit pictures to the public and for this they charged a license fee. The only thing the exhibitors had to sell was the right to view the pictures for an admission price to be paid by the public. The admission price sustains the entire industry and comes from the pockets of the public. It is forced to pay a price *which, respondents admit* (R. 717, 718, 936, 937), *could never be obtained in the absence of the suppression of competition.*

When they conspired together to fix admission prices these respondents put themselves in "head on" conflict with the prohibition of *United States* v. *Masonite Corp.*, 316 U. S. 265, which holds (p. 282) that it is illegal for "two copyright owners or patentees to restrain the competitive distribution of the copyrighted or patented articles in the open market". In the same case this Court said that the reason why price fixing is illegal is because such an arrangement "tends to place a premium on the

abandonment of competition". Certainly the arrangement presented here has that as its sole reason for existence (R. 962, 893).

The decisions of this Court make it perfectly clear that the privileges and immunities asserted by the distributors by virtue of their copyrights do not exist in the presence of a price-fixing conspiracy. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20.

(c) *The Verdict of the Jury Cannot Be Set Aside on the Theory That the Proof Gives Equal Support to Inconsistent and Uncertain Inferences.*

The only argument respondents made below in support of their assertion that there was no evidence of conspiracy was to the effect that admittedly uniform action of the distributors was explained by their uniform desire to meet the desires of B&K, their "most important customer." This argument does not attempt to meet the issue of a price-fixing conspiracy. To apply the theory here, it would be necessary to show that the admittedly uniform action was occasioned *with no price-fixing motive* and by the demand of individual theatres. The price-fixing motive is admitted here (R. 717, 718, 909, 933, 935, 937) and any claim that numbers of independent exhibitors insisted on the uniformity is completely negatived by the fact that the B&K and Warner contracts were negotiated prior to the contracts of any other exhibitors (R. 430, 339, 378, 380, 944, 998, 1015) and set the run of every theatre in the Chicago District. (R. 712, 837; Pfs.' Ex. 69; R. 495, 1780, 1796.)

The following testimony completely destroys respondents' contention that the uniformity of the distributors'

action is explainable by meeting the demands of their "most important customer," B&K.

Walter Immerman, the operating manager of B&K, testified on cross-examination as follows (R. 836-837):

> Q. Who suggested this: "The following clearance schedule for City of Chicago release to be observed: first week, second week and third week, open; fourth, fifth, sixth week regular established A pre-release theatres may play during this period. Minimum adults admission per person 30 cents matinee until 6:30 p. m., after 6:30 p.m. 50 cents." Who suggested that?
>
> A. Fox.
>
> Q. You did not suggest it?
>
> A. No. That is a restriction they placed on us for the classification of price and admission in our theatre.
>
> Q. And the same is true of the 7th and 8th week and the minimum admission price of 40 cents, right?
>
> A. Yes, sir.
>
> Q. And of the 9th week?
>
> A. Yes, sir.
>
> Q. And the 10th week?
>
> A. Yes, sir.
>
> Q. All right. Now, all the other distributors made the same request for minimum admission prices, didn't they?
>
> A. I believe so.
>
> Q. Well, you know so, don't you?
>
> A. Yes.

Since B&K was contracting ahead of all other exhibitors (R. 430), this testimony justified the jury's finding that the distributors had agreed, tacitly or otherwise, to impose a minimum price schedule, incorporated in a system of release, upon all the theatres in the Chicago District. However else could competitors just happen upon identical price restrictions enforced by identical forfeiture clauses, in identical runs, changing at the same hours of the day? This is obviously a too highly integrated, and

a too complicated and strongly implemented system, to have come about in any other way.

The early history of the business here in Chicago shows that under open market conditions distributors do not act in the same way. (RKO Ex. B-F; R. 1050, 2089.) It is only when they reach agreement that we find evidence of uniformity.

The distributors' witness, John E. Flynn, admitted on cross-examination that a distributor could not and would not permit competition at reduced admission prices. (R. 936, 937.) When, under these circumstances, the distributors all presented to the exhibitors the same schedule of runs, clearances and admission prices, the proof of conspiracy amounted to mathematical certainty (R. 836, 837) because no single distributor could risk entering into such restrictions if the other distributors were free to permit an exhibitor to charge such admission as it might choose. The distributors had to be in agreement on the fixed admission prices as a condition to agreeing to the Chicago system of release. *And they had to agree tacitly or otherwise to impose it on the three hundred or more independent theatres in the Chicago District as a condition to obtaining consent to it by their "most important customer," B&K.* (R. 837, 904-905, 960, 961.)

It was admitted (R. 936, 937) that competition would have destroyed the system. It follows that since the system went on unchanged for many years, competition had to be and was suppressed by agreement. This goes far beyond mere similarity of action. It is the most persuasive and compelling kind of evidence that a conspiracy existed between supposedly competing distributors to benefit themselves and the respondent exhibitors.

From the foregoing it is apparent that no other ruling was possible than that of the circuit court of appeals

when it said that the verdict of guilty of conspiracy "is supported by substantial evidence" (R. 2270) and that "the District Court, under the decisions to which we have referred, was warranted in concluding as a matter of law that such conspiracy was an illegal one, and if as a result of it plaintiffs were damaged thereby, they would be entitled to recover for such damage to themselves as they had proved under such theory or theories upon which they relied." (R. 2271.)

II.

There Is Substantial Evidence in This Record of Both the Fact of Damage to Petitioners' Motion Picture Business and the Amount of Such Damage, and Under the Decisions of This Court It Was the Duty of the Circuit Court of Appeals to Affirm the Judgment on the Jury's Verdict.

The circuit court of appeals said that there was no evidence submitted "upon which either the fact of damage or an approximation of the amount could be made". (R. 2273.) As already shown, the record not only does not support this statement but on the contrary completely disproves it.

The "fact of damage" in this case was the inability of petitioners to obtain pictures for exhibition until after they had been shown in all of respondents' comparable and competing theatres.

As appears in the Statement of the Case and under heading I above, petitioners' inability to obtain pictures on a competitive basis was proximately caused by respondents' contracts made pursuant to their price-fixing conspiracy.

The reviewing court conceded (R. 2272) that "if the fact

of damage is proved, the amount may be reasonably approximated if based upon competent evidence."

(a) *There Was Substantial Evidence of the Fact of Damage Caused to Petitioners' Business by Respondents' Acts in Excluding Petitioners from an Open Market.*

The reviewing court said that petitioners "vigorously contended that if they were permitted to purchase defendants' product by bid on an open market, the net profit of their theater in exhibiting those products would exceed their net profit under the Chicago system. It would seem then that the measure of damages in such case would be the excess, if any, of the former over the latter. The latter they knew and proved; the former they did not know, nor did they attempt to prove or approximate it by competent evidence." (R. 2272.)

The basis for the statement that "the former they did not know" is clear from the admission made by respondents in their answer to the petition for certiorari. They say (p. 4): "The conspiracy which prevented the petitioners from bidding for runs and clearance was in effect long prior to and during both of these periods" (*i. e.*, the five years subsequent to July 28, 1937 and four years prior thereto).

When the reviewing court's statement went farther to the effect that petitioners did not "attempt to prove or approximate it by competent evidence" (R. 2272), it was in conflict with a great weight of substantial and uncontradicted evidence "of a kind as definite and certain as the subject-matter admitted", *Wm. H. Rankin Co.* v. *Associated Bill Posters, etc.*, 42 F. 2d 152, 155 (CCA 2). It shows the net profit of petitioners' theatre in an open market "would exceed their net profit under the Chicago system".

In an open market petitioners' theatre would have had, during the period embraced by this suit, two chief and adjacent competitors—the Warner Jeffery and the B&K Maryland. (R. 214-215.) In the closed market in which they were actually operated, these theatres obtained pictures a week ahead of petitioners', not by virtue of the theatres' individual merit, but because under the illegal system of release their playing positions were fixed at the time B&K negotiated its Loop runs and at the time Warner negotiated its A runs. (R. 429-430, 709-11, 998.) These theatres' contracts were part of a larger negotiation about the Loop and A runs (R. 837, 490) in which respondent distributors bargained for a share of those choice box-office receipts on a percentage basis. As already shown, under this system of release no independent theatre could even negotiate about an earlier playing position until the entire B&K and Warner chains were sold, and after such sale negotiation would avail nothing. Respondents have admitted in this Court (answer to petition for certiorari, p. 7) that petitioners' money would buy nothing except what B&K and Warner did not want. That petitioners at all times were ready, willing and able to pay more for earlier pictures than either the B&K Maryland or the Warner Jeffery was shown by competent and uncontradicted evidence. (R. 112, 124, 139, 178, 179.) As one of respondents' witnesses put it, the illegal system forced petitioners "to eat at the second table." (R. 798.) Therefore, because of respondents' conspiracy, petitioners could not change their playing position no matter what they did.

As pointed out in our Statement of the Case, *ante*, pp. 14-15, and in contradistinction to the position in which petitioners found themselves, the jury had the right to find from respondents' own admissions that, in the absence of respondents' conspiracy and under open market conditions,

petitioners could have bought pictures in the same run as the Jeffery and ahead of the Maryland.

As this Court has stated in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 562, the jury did not have to indulge the assumption that "respondents' acts would have been the same if they had been acting independently of one another" and not under the influence of the tremendous box-office receipts in the B&K Loop and A runs which the distributors were sharing on percentage at high fixed admission prices. Nor did the jury have to assume that, if the distributors had been competing with one another for petitioners' business, they would have ignored the elements of location and other physical attributes of petitioners' theatre (R. 1132-1137) which showed petitioners entitled to earlier pictures.

As stated in *Youngclaus* v. *Omaha Film Board of Trade*, 60 F. 2d 538, 540:

> "The plaintiff is entitled to the right to bargain with distributors who are free from a combination among themselves not to bargain with the plaintiff unless he shall consent that his rival shall have had the first opportunity to exhibit a picture."

The denial of this right kept petitioners' theatre in a run ten weeks after the conclusion of the Loop run and a week behind the Maryland and the Jeffery. Since there is substantial evidence that petitioners' theatre, in a run ahead of the Maryland and on a parity with the Jeffery, would have had more box-office receipts than it did playing pictures under the illegal system of release, the "fact of damage" is shown.

Walter Immerman, general manager of B&K, had spent his entire business life as an exhibitor. When asked what would happen if part of the pictures went to the Maryland and part to the Jackson Park in the same playing position, he testified (R. 860) "The Jackson Park would have more

to offer the public than they did before." He said an earlier run picture "has a larger box-office potentiality" (R. 856).

James Coston of Warner's testified that earlier pictures increased a theatre's box-office receipts, saying, with reference to the earlier picture,—"it has the best box-office" (R. 1094), as did Sam Shirley of Loew's, who said the earlier run had more "box-office appeal" (R. 906).

All this Court required as proof of the "fact of damage" in the *Story Parchment* case was a showing to justify the statement that "it is fair to say that the natural and probable effect of the combination" would be to injure petitioners (282 U. S. at pp. 561, 563). Here the proof shows to a certainty that the illegal system prevented petitioners from buying earlier pictures with which they could have made more money.

In the case of *William Goldman Theatres, Inc.* v. *Loew's Inc., et al.*, 150 F. 2d 738, decided August 3, 1945 by the Circuit Court of Appeals for the Third Circuit, the record presented a suit for treble damages under the Sherman Act which the court below had dismissed on the ground that the monopoly proven was not an unreasonable restraint of trade. In its opinion the court said (pp. 741-742):

> "Plaintiff, having been engaged in the business of exhibiting motion pictures in and about Philadelphia for many years, is completely qualified to operate a first-run motion picture theatre in Philadelphia. In 1940, plaintiff decided to enter the first-run business. The Erlanger Theatre, located at 21st and Market Streets, one city block from Warner Brothers' Mastbaum Theatre, was available for leasing. The Erlanger has a seating capacity of 1859 persons. Its appointments are quite as elegant as any of those of the Warner theatres. As to management, reputation and in all other respects, the Court below found, the Erlanger was suitable for profitable exhibition of

first-class feature motion pictures on first-run in competition with the theatres operated by Warner Brothers. Plaintiff's 10 year lease of the Erlanger commenced on November 9, 1940, at an annual rental of $12,000. After leasing the Erlanger plaintiff made repeated requests to the distributor defendants to lease feature pictures for first-run exhibition upon offers to pay much higher prices for pictures than the distributors had been receiving from Warner Brothers. Plaintiff was able to offer such prices because of the favorable terms found in its lease. But, distributor defendants refused and still refuse to lease any of such pictures to plaintiff for first-run exhibition."

The circuit court of appeals reversed the district court's decision on the issue of monopoly, affirmed its decision on the issue of the fact of damage, that "plaintiff has unquestionably suffered loss" (150 F. 2d at p. 745), and directed the entry of a judgment in favor of the plaintiff. However, since the fixing of damages was for the district court, the case was remanded for determination of the amount.

Thus, in the above case, on facts less favorable to the plaintiff than those presented in the case at bar, the district court and circuit court of appeals both held the "fact of damage" to be established. In that case there could have been no question of comparing earnings in an "open market" because the Erlanger Theatre had never been in business. In the instant case, on the other hand, the reviewing court has held, in effect, that the only way the fact of damage can be established is by comparing actual earnings with "open market" earnings. And this proof, as we have pointed out, can never be made because of respondents' own wrongdoing. It follows that the decision of the Circuit Court of Appeals for the Third Circuit cannot be reconciled with the decision in the present case, and we submit that the latter decision is clearly wrong.

That it is in conflict with the opinion of this Court in the *Story Parchment* case, 282 U. S. 555, is shown by this Court's quotation of the language of the Supreme Court of Michigan when it said (pp. 563-564):

> "But shall the injured party in an action of tort, which may happen to furnish no element of certainty, be allowed to recover no damages (or merely nominal), because he cannot show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would thus be obtained; but it would be the certainty of injustice."

And, in the *Story Parchment* case, in defining the province of the jury as to that question, this Court further said (282 U. S. at p. 566):

> "Whether the unlawful acts of respondents or conditions apart from them constituted the proximate cause of the depreciation in value, was a question, upon the evidence in this record, for the jury, 'to be determined as a fact, in view of the circumstances of fact attending it.' • • • And the finding of the jury upon that question must be allowed to stand unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts."

(b) *There Was Sufficient Evidence to Support the Verdict as to the Extent of the Damage Caused by Respondents' Exclusion of Petitioners from an Open Market.*

In the present case, the fact of damage caused to petitioners by their exclusion from an open market having been found by the jury and supported by the proof, the only question remaining is whether there was evidence of the amount thereof which meets the tests laid down by this

Court in the *Story Parchment* case. There this Court said (282 U. S. at pp. 562, 563, 565-566):

> "It is true that there was uncertainty as to the extent of the damage, *but there was none as to the fact of damage*; * * *.
>
> "In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. * * * 'The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery.' " (Italics supplied.)

The jury had evidence before it proving that under a free system which permitted petitioners to bid for pictures, they would have been able to buy an earlier run and thereby to increase their net admissions by at least $120,000 during the period embraced in this suit. This proof has been fully discussed *ante*, pp. 14-17.

As shown by the comparative tables set out above at page 16, the proof supports a larger verdict than that rendered by the jury. The figures leave a large margin for error.

Richard Salkin testified that with increased admissions petitioners' theatre's operating expense remained constant (R. 203). The only variable which the purchase of earlier pictures would bring was the increased film rental, but the records of the Maryland and the Jeffery show that this averaged around $42,000 a year as compared with an average of $27,000 which petitioners were paying (Pfs.' Ex. 47; R. 466, 1712). The admission price at petitioners' theatre was 30¢ and if it could charge that for later pictures there is no reason to suppose that it could not charge and get 30¢ for earlier pictures against the same competitors. The film rental should have been even less in a

competitive market with the distributors bidding against each other for business instead of conspiring to prefer the B&K and Warner chains.

(c) *There Was Substantial Evidence of the Fact of Damage and Its Amount Caused to Petitioners' Business by Respondents' Illegal Double Featuring.*

The reviewing court correctly stated that, in determining the sufficiency of the proof on the issue of damages, its duty was "to affirm if the verdict was based upon substantial competent evidence" (R. 2271).

It is apparent from our Statement of the Case, and the argument under sub-head (a) above, that the conspiracy found by the reviewing court to exist was designed to draw patrons to respondents' theatres and away from petitioners' theatre. Certainly it would not have been continued for seventeen years had it not succeeded in doing so. This destroys respondents' contention on page 8 of their answer to the petition for certiorari, where they say:

> "Even if it be assumed, therefore, that plaintiffs' profits under the illegal system were reduced as a result of double featuring, there still is no evidence from which it could be determined whether their profits, as so reduced, were more or less than they would have been but for the conspiracy."

Since the evidence shows that the illegal system prevented petitioners from making more money through pictures bought in an open market, then it inevitably follows that, when respondents extended the system to embrace all available pictures by double featuring, petitioners' "profits, as so reduced", were "less than they would have been but for the conspiracy."

Thus, the two methods of computing damages are not entirely independent but instead support one another.

In the effect of illegal double featuring on petitioners' business the reviewing court itself finds the existence of what this Court in the *Story Parchment* case, 282 U. S. 555, 562, terms the "fact of damage". The reviewing court said (R. 2274) that prior to double featuring petitioners' theatre was always able to obtain some pictures free of the restrictions of the illegal system and not already shown in respondents' competing theatres. The court then found that after double featuring was started in respondents' theatres those pictures were taken away by respondents' prior contracts, made pursuant to and as a part of the conspiracy, and placed under the restriction of the illegal system, but concluded (R. 2275):

> "However, we are again confronted with the absence of proof as to *the amount of damage* suffered by plaintiffs as a proximate result of defendants' acts in this respect, and there is no evidence from which it can be reasonably approximated." (Italics supplied.)

The reviewing court thus recognizes the existence of the "fact of damage" flowing from respondents' illegal double featuring but has failed to perceive, in determining "the amount of damage", the probative value of a comparison between petitioners' theatre's profits under single features and its profits under double features.

Even respondents in their answer to the petition for certiorari concede (p. 6), "The evidence relied on by the petitioners was to the effect that double features caused the decline in their profits shown by their calculations." Since double featuring under the circumstances in this case was found to be illegal by the jury and the reviewing court, a comparison between earnings in petitioners' theatre before and during the course of the illegal

conduct was certainly "substantial competent evidence" of the amount of the damage. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 377.

(d) *The Decision of the Circuit Court of Appeals in Holding That Petitioners' Proof of Damages Was Irrelevant Is Erroneous and Against Public Policy.*

In order to give judgment for respondents and thus destroy petitioners' verdict, the reviewing court had to find that the foregoing proof not only did not support the amount of the verdict under either or both methods of computing damages, but also did not prove even one cent of damage to petitioners' business.

To do this the court had to ignore the comparison of earnings of the Jackson Park under single and double features. That it did so is shown by its statement that, "on this phase of the case they merely proved the normal earnings of their theater for five years immediately preceding their ownership." (R. 2272.) This statement loses all substance when it appears that these so-called "normal earnings" were made when the theatre could still buy some pictures free of the illegal system and were compared with earnings made after respondents had wholly deprived petitioners of such pictures by placing them all under the restrictions of the system.

The reviewing court also had to make some disposition of the comparison of the earnings of petitioners' theatre with those of the Maryland and the Jeffery. It disposed of the Jeffery's earnings by ignoring them. It disposed of the Maryland's earnings by saying, "Certainly such evidence would not tend to prove what profits either would have received under any system other than the illegal Chicago system, and it is clear that it was neither offered nor admitted for that purpose." (R. 2272.)

We have already pointed out that these comparisons did approximate what petitioners' theatre would have earned in the absence of respondents' conspiracy. That the reviewing court is completely in error in saying that the proof was not offered for this purpose is shown by the following colloquy when the proof was offered (R. 228):

> The Court: There is no point to his proving what his profits would have amounted to, if he is conducting business in his present run. He has been doing that. That is what he is complaining about. He is complaining that, if he were given his right, as he sees his right to exist under this situation, he would have been permitted to do business under the different run.
>
> Mr. McConnell: Certainly.
>
> The Court: There is not any point to his proving what business he does under his present run.
>
> Mr. McConnell: Exactly.
>
> The Court: That is what he is complaining about.
>
> Mr. McConnell: We were saying, *in the open market*, we could bid and obtain that run.
>
> The Court: The ruling will be that he may answer that question.

In saying that such proof was irrelevant in approximating an open market, the reviewing court failed to see that run and clearance as such are not attacked in this case. Respondents submitted several instructions to the effect that, in the absence of conspiracy, agreement or combination with competitors, any theatre owner has a right to buy a prior run or clearance in open competition with other theatres (R. 1217, 1218, 1219, 1220). It follows that, so long as petitioners did not conspire with respondents to obtain a prior run, petitioners had every right to negotiate for and attempt to buy one.

It is likewise true that the jury had a right to assess damages for an illegal denial of the right to buy a run on the basis of the value of the playing position of which peti-

tioners were deprived. This could be determined only by proof of what the theatres which illegally obtained a comparable position earned with it.

When respondents destroyed an open market they made petitioners' proof competent. Nevertheless, the reviewing court in effect adopted respondents' argument that because they had destroyed an open market there was no way in which petitioners could prove their damages. (R. 450, 2272.)

Respondents now say in their answer to the petition for certiorari (p. 4):

> **"The conspiracy which prevented the petitioners from bidding for runs and clearance was in effect long prior to and during both of these periods."**

They thus attempt to reach the same unconscionable result by asserting their own wrongdoing as the reason for the uncertainty they allege to exist in petitioners' proof of damages.

In the *Story Parchment* case this Court said (282 U. S. at p. 563):

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. • • • The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. • • • As the supreme court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party."

This Court then said (p. 565):

> "'Whatever of uncertainty there may be in this mode of estimating damages, is an uncertainty caused by the defendant's own wrongful act; and justice and sound public policy alike require that he should bear the risk of the uncertainty thus produced; * * *.'"

In *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, this Court said (p. 379):

> "* * * a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible."

If this were not so, it would mean, as said in *Package Closure Corporation* v. *Sealright Co.*, 141 F. 2d 972, 979 (CCA2):

> "* * * that the more grievous the wrong done to the plaintiff by the defendant, the less likelihood there would be of a recovery."

The trial court recognized that a wrongdoer cannot be permitted to gain an advantage by his own wrong and instructed the jury (R. 1277) that in assessing petitioners' damages they might use a "reasonable basis of computation" although "the result be only approximate." This was the law of the case and it made petitioners' proof of damages entirely relevant because it was the best proof available.

There is far reaching and serious public consequence in the refusal of the circuit court of appeals to permit the jury to base their verdict on petitioners' proof. In effect, the decision in this case places a premium upon a violation of the antitrust laws which is unique in this country's jurisprudence. Under the court's ruling the more complete and effective such violation becomes the more certain

the immunity from the treble damage section of the Sherman law.

Followed step by step, the conspiracy described in the court's opinion and characterized by it as illegal becomes a blueprint for immunity under the law. Since the same system is carried on by respondents throughout the United States (R. 682) an entire industry is in effect thus given exemption from civil suits under the Sherman law. The court has thus created a precedent which if not reversed points the way for future violations of the antitrust laws contrary to the philosophy and public policy expressed in the Sherman and Clayton Acts.

III.

The Circuit Court of Appeals, by Its Construction of the Verdict, the Instructions and the Evidence, Has Deprived Petitioners of Their Constitutional Right to a Jury Trial.

The facts hereinbefore set forth cannot be ignored without depriving petitioners of their jury trial. The reviewing court obscured this without warrant by undertaking (1) to construe the instructions and the verdict, and then (2) to substitute its own opinion on the facts for that of the jury.

(a) *The Reviewing Court Erred in Construing Issues Out of the Case.*

At the outset of its opinion the circuit court of appeals undertook to construe the general verdict of the jury in a manner to exclude a finding of respondents' guilt in refusing to license pictures to petitioners' theatre under the illegal system "earlier than the first week of Chicago general release." (R. 1267.)

In reaching this conclusion it first stated that petitioners relied on two inconsistent theories of conspiracy (1) "that the entire system of release is part of a price-fixing scheme and therefore illegal under the Sherman Act" (R. 2266), and (2) "that apart from the illegality of the system, defendants illegally discriminated against the plaintiffs by refusing to permit them to negotiate and purchase a higher playing position than that which they had under their contract" (R. 2266).

The court then said (R. 2268):

> "Defendants contend that under the court's instructions, as requested by plaintiffs, the jury were required to choose between two inconsistent theories, and that they could not recover on both. • • •"

The court continued:

> "The plaintiffs now argue before us that the jury did not have to choose between two theories of conspiracy because if they found the larger conspiracy to exist, they could still have found that as a part of it, or independent of it, the defendants conspired to prevent plaintiffs from acquiring a C run; that the jury, under other instructions of the court, not specifically referring to them, could find the defendants guilty of either or both conspiracies, and apply either theory of damages. In other words, they say that the greater conspiracy includes the lesser and does not exclude it." (R. 2268.)

The court then concluded that it found no instruction given "which supports plaintiffs' argument referred to in this paragraph of our opinion." (R. 2268.) If the court intends by this statement to say that no such instruction was given, it is simply mistaken.

The record shows that, at the instance of respondents (R. 1213-1214, 1266-1267), the jury were instructed that there was one general conspiracy alleged which was

claimed to have had for its objects "*one or more*" of the following:

> First: To maintain in the Chicago District a system of release such that respondents' theatres were given priority of run and clearance over independent theatres including petitioners';
>
> Second: To discriminate against petitioners' theatre by refusing to license pictures to it in a run earlier than the first week of general release being the tenth week after the conclusion of the Loop run;
>
> Third: To force petitioners to exhibit double features by introducing double features in respondents' theatres.

Respondents also had given (R. 1224, 1276) an instruction specifically on the subject of damages which permitted the jury to find damages resulting from "*one or more* of the objects charged by the plaintiffs."

In spite of these instructions, the reviewing court held that the first and second objects were different conspiracies and therefore mutually exclusive (R. 2269), and that, since the proof only supported damages caused by the second theory of conspiracy to the extent of $115,982.34 (R. 2269), and since the verdict for $120,000 was in excess of that amount, it could not have included a finding that respondents were guilty of the acts charged by the second object of the conspiracy. (R. 2269.)

We have already shown, at pages 16 and 41, that the damages caused by the second object of the conspiracy supported the full amount of the verdict.

We suggest, as a matter of simple logic, that even if the proof had not shown larger damages than the court said, a general verdict of guilty in an amount large enough to include damages caused by "one or more" of the three objects of a general conspiracy does not exclude a finding of guilty of the acts charged by the second object but includes

it. Under respondents' instruction the jury could have found them guilty of a conspiracy which included all three of the objects therein enumerated. The limitation of the damages to the amount of $120,000 was necessitated not by the choice of any theory in assessing them but by the *ad damnum* in the complaint (R. 1259). The amount of the verdict therefore furnishes no clue whatever as to the rationale of the jury.

In support of its position to the contrary the reviewing court quotes (R. 2268) an instruction tendered by petitioners which told the jury:

> "* * * that only in the event that you find that there exists no conspiracy or combination to fix admission prices or no unreasonable restraint of trade by the defendants by virtue of the Chicago system of release will you have occasion to consider whether or not the plaintiffs demanded and sought to obtain a playing position in 'C' week."

This instruction was not, as the court intimates, given to differentiate between two theories of conspiracy. The moment the proof showed a general price-fixing conspiracy which had for one of its objects discrimination against petitioners' theatre by "refusing to license pictures to it in a run earlier than the first week of general release" (R. 1267), proof of *a demand* for a t week run became superfluous. It would then have been a useless gesture and that is all the instruction told the jury.

It appears from the above that the reviewing court had no logical basis for saying that petitioners' instruction forced the jury to choose between two inconsistent theories of conspiracy. If it was erroneous or in conflict with some other given instruction respondents had to assign error on that ground. However, the reviewing court said, "No question is here raised by any party as to the correctness of any instruction given or refused." (R. 2268.)

The sole question presented is whether there is any basis for the reviewing court's construction of the verdict. If there is not, then that court has destroyed petitioners' verdict without warrant. It adds nothing for that court to say "We must presume that the jury followed the Court's instruction" (R. 2269) because even if petitioners' instruction could be construed as the court suggests, the question still remains as to which instruction the jury followed. It is obvious that the reviewing court had no way of knowing what went on in the minds of the jury nor could the court logically say that the jury could not or did not pass on the factual issues placed before them by any good instruction.

Actually, respondents' instructions told the jury that one general conspiracy might be found which included "one or more" of the objects therein enumerated and this included them all. Notwithstanding the reviewing Court's remarks to the contrary (R. 2268) "the greater conspiracy includes the lesser and does not exclude it."

The reviewing court was on even more tenuous ground when it construed remarks of petitioners' counsel as tantamount to an inconsistent position in the argument before the jury (R. 2268). The jury were instructed (R. 1263) to pay no attention to what any lawyer said about the law of the case.

Returning to our original contention, the record shows that the issue of whether the all-inclusive conspiracy proven had for one of its objectives a discrimination against petitioners' theatre, by refusing to license it with pictures earlier than ten weeks after the conclusion of the Loop run, was properly in issue before the jury. The general verdict concluded that issue along with all others in the case.

In *Flournoy v. Lastrapes*, 131 U. S., App. clxi, this Court

said (p. clxii) that a general verdict is equivalent to a special finding in favor of the prevailing party "upon each and every one of the issues tried, and authorizes any judgment that could be entered on such finding".

Nevertheless the reviewing court concluded that the verdict was not based on what it called "the second theory" (R. 2269) "to discriminate against plaintiffs' theater with respect to the run made available to it within the framework of that system." (R. 2270.)

We submit, from what has been said above, that a reviewing court has no jurisdiction to dissect, analyze and interpolate its own thought into the general verdict of a jury in this manner, and no power to enter a judgment *non obstante veredicto* where substantial damages under any theory are shown. *Mirich* v. *Forschner Cont. Co.*, 312 Ill. 343, 358.

Since the reviewing court conceded that damages had been caused to the extent of $115,982.34 by the second object of the conspiracy (R. 2269) it erred in entering judgment for respondents. As this Court said in *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 35, "Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial."

(b) *The Instructions Could Not Be Construed as Having Prevented the Jury from Considering All the Evidence on the Issue of Damages.*

When the reviewing court said that petitioners' proof of damages under what it called "the second theory" was limited to proof of a comparison of petitioners' profits with those of the Maryland (R. 2269) it ignored instructions which permitted a like comparison with the profits of the Jeffery.

On the issue of damages the jury had not only the right but the duty to utilize all the evidence in the record in reaching their verdict. On the inability of petitioners to buy pictures until after their showing in competing theatres the jury were instructed (R. 1275) that their verdict should be for petitioners, even though petitioners did not exhibit at less than the fixed admission prices, if the jury found that (1) respondents were in a combination to fix admission prices under a system of release which set up runs and clearances; and (2) as a result petitioners were unable to exhibit pictures until they had been shown in respondents' theatres; and (3) as a proximate result thereof petitioners were damaged.

The only way of determining whether petitioners were damaged in the manner set forth in the above instruction was for the jury to compare petitioners' receipts with those of the Jeffery as well as those of the Maryland.

Again the jury were instructed (R. 1265) that if they found that the Chicago system of release was an inseparable part of a price-fixing scheme between respondents or some of them, then the contracts and clearance schedules incorporating the same were illegal and petitioners were entitled to recover any damages proximately caused thereby.

As respondents admit in their answers (R. 34, 43, 44, 53, 62), it was their illegal clearance contracts that made it impossible for petitioners to bid for run and clearance as against their immediate competitors, the Maryland and the Jeffery.

Again, respondents themselves tendered an instruction describing the conspiracy as one giving them "preference and priority in the exhibition of such film over independent exhibitors, including the plaintiffs" (R. 1213, 1267) and telling the jury that in arriving at their

verdict "you are to consider all of the evidence both direct and circumstantial" (R. 1221). Respondents further tendered an instruction which permitted the jury to find any damages "proved by facts from which their existence is logically inferable" (R. 1224).

However, respondents tendered (R. 1237) and had given (R. 1270), over the objection of petitioners' counsel (R. 1240), an instruction which set forth only two measures of the amount—first, a comparison of the net admissions of the Jackson Park with the Maryland and second, a comparison of average earnings of petitioners' theatre prior to July 28, 1937 with its earnings during the time embraced in the suit. This instruction told the jury that they had to find what portion of these net admissions or earnings would have been derived from "open competition." (R. 1271.)

Since respondents had destroyed an open market throughout the period embraced in this suit, the trial court instructed the jury to use a "reasonable basis of computation" although "the result be only approximate" (R. 1277).

When the jury were permitted to approximate what petitioners could have earned in an open market the entire record was opened up for the consideration of the jury on this issue. That is to say, the earnings of the Jeffery had as much relevance as those of the Maryland or of any other competing theatre.

It was to the above instruction setting forth two measures of damages that the reviewing court referred when it said (R. 2268):

> "The court further instructed the jury that plaintiffs were seeking to recover on either one of two theories, and that the jury, in determining the fact of injury, and in assessing the damages therefor, if any, 'must choose one or the other of said two theories.'"

In making this statement the reviewing court ignored the fact, heretofore pointed out, that respondents tendered and had given on the specific issue of damages a conflicting instruction which in effect told the jury that they need not choose between two theories but on the contrary could find that respondents had conspired to accomplish "one or more of the objects charged by the plaintiffs," and on such a finding that they must further find "the amount of the damages, if any, suffered by the plaintiffs as a result of the injury" (R. 1224, 1276).

This last instruction correctly stated the law applicable to the issue of damages and while the reviewing court ignored it, the jury did not have to do so and could legally base their verdict on it, *White Walnut Coal Co.* v. *Crescent Coal Co.*, 254 Ill. 368, 378.

That the conflict in respondents' tendered instructions furnishes no ground for construing or disturbing the verdict is shown by *Birmingham Amusement Co.* v. *Norris*, 216 Ala. 138. After discussing the cases which hold that a jury must follow the instructions and that they constitute the law of the case the court held (p. 142):

> "The principle of all these cases is that a plain instruction from the trial judge must be followed by the jury, whether it be right or wrong, and, if wrong, the remedy of the injured party is by motion for new trial. *But, if there is also given any conflicting instruction which would authorize the verdict rendered, the verdict will not be set aside for that it disobeys some of the other given instructions.*" (Italics supplied.)

As the reviewing court said (R. 2271), the only question before it was whether the verdict for $120,000 damages was supported by "substantial competent evidence." As we have shown, the proof was competent and it supported a much larger verdict.

(c) *The Reviewing Court Could Not Substitute Its Own Opinion on the Evidence Without Invading the Province of the Jury.*

The reviewing court said (R. 2273) that Richard Salkin's testimony (R. 963) that petitioners' theatre could have doubled its admissions with C-run pictures did "not purport to be based on any knowledge of the witness. It was a mere guess." Salkin had been in the business for 25 years both as a salesman for the film companies and as a theatre manager (R. 170, 220). He was testifying as an expert from the background of his entire business experience in the industry and from an intimate knowledge gained in operating petitioners' theatre for 17 years. The weight of this testimony was for the jury. The remarks of the court invaded its province. In *Wm. H. Rankin Co.* v. *Associated Bill Posters, etc.*, 42 F. 2d 152 (CCA 2) the court, in passing on the competency of similar testimony, said (p. 155):

> "The defendants had caused the damage, and cannot be permitted to escape liability because it is difficult for the plaintiff to express in terms of dollars the damages it has suffered. This evidence, while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject-matter admitted. It had to do with what was never earned because of defendants' wrongdoing. * * * Whatever may be said of its weight, and that was entirely for the jury, we have no difficulty with its admissibility."

In the instant case the reviewing court further said (R. 2272):

> "The undisputed evidence is that plaintiffs neither operated nor assisted in operating any theater prior to their ownership of this one, and these facts would only prove that matters other than the illegal Chicago system had proximately caused the damages assessed by the jury."

But here again the court undertook to substitute its own opinion for that of the jury on a fact question and even respondents admit there is no legal basis for the court's statement (ans. to pet., p. 16). Furthermore, Salkin had managed petitioners' theatre both prior to (R. 220) and during petitioners' ownership (R. 131), so loss could not be attributed to the mere change of ownership, *Palmer* v. *Connecticut R. & Light. Co.*, 311 U. S. 544, 560.

Salkin assigned the loss of profits to the illegal system and to the greater impact on the theatre's business under the illegal double featuring (R. 174). Aside from all other contentions, the jury had every right to follow this testimony, and their verdict shows that they did.

In the *Story Parchment* case, this Court, in refusing to follow the holding of the court below that there was no proof of the "fact of damage", stated (282 U. S. at p. 566):

> "But this conclusion rested upon inferences from facts within the exclusive province of the jury, and which could not be drawn by the court contrary to the *verdict of the jury without usurping the functions of that fact finding body.*" (Italics supplied.)

And in *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, this Court said (p. 35):

> "It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. • • • That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

IV.

The Circuit Court of Appeals Erred in Stating That Petitioners Had Abandoned Their Application for an Injunction.

Respondents admit in their answer to the petition for certiorari (p. 10) that "The Record shows that on motion of the petitioners the prayer for equitable relief was continued until after the disposition of the appeal from the judgment at law, petitioners' counsel being of the opinion that such appeal probably would dispose of all disputed issues involved in the prayer for equitable relief (R. 2096)."

The remarks of the circuit court of appeals to the effect that petitioners had abandoned their application for an injunction (R. 2271) are, therefore, gratuitous and concern a branch of the case of which the district court alone has jurisdiction. However, petitioners should not be compelled to rely on respondents' promise at p. 10 of their answer to the petition for certiorari, that they "have no intention of opposing the taking up of the equitable issues by the trial court on the ground of abandonment by the petitioners." There admittedly was no abandonment and the reviewing court erred in saying that there was.

We respectfully submit that petitioners are entitled to the issuance of an injunction against an admittedly illegal system of distribution and exhibition without having to meet the extraneous issue interjected by the reviewing court's remarks, and that those remarks should be stricken.

Conclusion.

The decision of the reviewing court in effect encourages respondents' monopoly and their particularly vicious method of suppressing competition. On the other hand, the judgment of the district court, if affirmed, will end respondents' illegal method of distributing and exhibiting motion pictures. *If respondents must answer in damages for their illegal acts the business risk involved will preclude them from continuing those acts.*

Here the public interest is directly involved, and it was to protect that interest that Congress made provision for this kind of suit. The public is mulcted of high admission prices artificially maintained by illegally preventing the early showing of pictures except in respondents' own theatres at high prices. The public is thus forced to wait long intervals of time to see pictures anywhere else.

This case presents to this Court the issue of whether a verdict which has vindicated the public's statutory right to an open market can be ruthlessly set aside by the imposition of an arbitrary and unconscionable measure of damages as a condition of recovery. If it can, the treble damage section of the antitrust laws becomes worse than meaningless as it will then offer a positive incentive to make the destruction of an open market so complete that its victims will be deprived of the only proof of damages which is available and competent. The imposition of such a rule stultifies all that this Court has said about the overriding public interest sought to be preserved by the antitrust laws.

We most respectfully submit that the judgment of the Circuit Court of Appeals for the Seventh Circuit is manifestly

erroneous and against public policy and for the reasons given in this brief should be reversed and the judgment of the district court affirmed.

Respectfully submitted,

THOMAS C. MCCONNELL,
HUBERT VAN HOOK,
Counsel for Petitioners.

Dated at Chicago, Illinois,
January 4, 1946.